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No. 06-1521

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LOUIS GERARD GOERES,

Petitioner,

v.

CHARLES SCHWAB & CO., INC., SCHWAB RETIREMENT PLAN SERVICES, INC., and ADMINISTRATIVE COMMITTEE OF THE SCHWABPLAN RETIREMENT SAVINGS AND INVESTMENT PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review a question as to which the circuits are not in conflict, *i.e.*, whether a former beneficiary of a 401(k) plan can recover, as "equitable relief" under Section 502(a)(3) of ERISA, monetary damages allegedly resulting from a breach of fiduciary duty affecting the value of his plan account.

LIST OF PARTIES AND DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The names of all parties to this proceeding are contained in the caption of this case.

Respondent Charles Schwab & Co., Inc. is a 100%-owned subsidiary of Schwab Holdings, Inc., which is a 100%-owned subsidiary of The Charles Schwab Corp., a publicly held corporation.

Respondent Schwab Retirement Plan Services, Inc. is a 100%-owned subsidiary of The Charles Schwab Corp., a publicly held corporation.

Respondent Administrative Committee of The SchwabPlan Retirement Savings and Investment Plan has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

Petitioner Louis Gerard Goeres ("Petitioner") alleges that he was the beneficiary of the plan account of his domestic partner, Stephen M. Ward, a participant in the SchwabPlan Retirement Savings and Investment Plan (the "Plan").[1] Petitioner further alleges that Respondents Charles Schwab & Co., Inc., Schwab Retirement Plan Services, Inc.,[2] and Administrative Committee of the SchwabPlan Retirement Savings and Investment Plan ("Respondents") breached their fiduciary duties with respect to his right to benefits under the Plan, resulting in monetary losses exceeding $1,000,000.[3]

Specifically, in his complaint filed on May 14, 2004 in the Northern District of California ("District Court"), Petitioner alleges that Mr. Ward completed a beneficiary designation form naming Petitioner as his primary beneficiary under the Plan.[4] In January 2000, Petitioner informed Schwab of Mr. Ward's death and later provided Schwab with the death certificate.[5] Petitioner then alleges he contacted (in January or February 2000) Schwab Retirement Plan Services and erroneously was told that he was not Mr. Ward's beneficiary.[6]

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[1] Pet. App. 3.

[2] Schwab Retirement Plan Services, Inc. is a record keeper and not a fiduciary under the Plan.

[3] Pet. App. 5.

[4] Pet. App. 3-4.

[5] Pet. App. 4.

[6] Pet. App. 4.

Petitioner claims he did not receive notice he was the beneficiary until May 15, 2001, and that the notice did not adequately inform him of his distribution options as a non-spouse beneficiary.[7]

Petitioner further alleges that these acts caused him monetary harm through "investment losses." He alleges that the value of Mr. Ward's plan account was $1.2 million in December 1999, the month of Mr. Ward's death, that the value of the stock in the account increased to $1.6 million as of June 30, 2000, and that the value of the stock decreased to approximately $565,000 in 2004 when Petitioner requested a distribution of the then-full value of the account from the Plan.[8] Petitioner asserts that the investment losses would have been avoided had Respondents provided him with an application for benefits in a timely fashion after Mr. Ward's death and had Respondents adequately informed him of his benefit distribution options.[9]

Petitioner sought "injunctive and other equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3).[10] In particular, Petitioner asked that the District Court:

> [o]rder that Defendants, and each of them, take all steps necessary to place Plaintiff in the position

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[7] Pet. App. 4.

[8] Pet. App. 5. The account held Schwab stock and a few small mutual fund positions.

[9] Pet. App. 5.

[10] Complaint ¶ 37, R.E. 7.

> he would have been in had Defendants not breached their fiduciary duty, including, but not limited to, modifying the Retirement Plan's records to reflect Plaintiff's entitlement to a distribution of Mr. Ward's account valued as of a date no later than June 30, 2000.[11]

On July 1, 2004 Respondents moved to dismiss the Complaint for failure to state a claim upon which relief could be granted.[12] In a Memorandum and Order dated September 28, 2004, the District Court granted Respondents' motion to dismiss, except as to Petitioner's request for an injunction.[13] Petitioner appealed the case to the United States Court of Appeals for the Ninth Circuit.[14] After briefing and oral argument, the Ninth Circuit affirmed the District Court's opinion.[15] Petitioner filed a timely petition for a writ of certiorari.[16]

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[11] Complaint ¶ C of Prayer for Relief, R.E. 7.

[12] *See* Pet. App. 3; *see* U.S. District Court, California Northern District, Civil Docket for Case # 3:04-cv-01917-CRB Doc. 5, R.E. 22.

[13] Pet. App. 13. Petitioner subsequently withdrew his prayer for injunctive relief pursuant to a stipulation of the parties. *See* U.S. District Court, California Northern District, Civil Docket for Case # 3:04-cv-01917-CRB Doc. 31, R.E. 24.

[14] Notice of Appeal, R.E. 17-18.

[15] Pet. App. 1-2.

[16] *See* Pet. Br.

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals Correctly Applied This Court's Settled Construction Of ERISA Section 502(a)(3)

The Ninth Circuit Court of Appeals unanimously affirmed the District Court's decision for the reasons stated by the District Court in its order granting the motion to dismiss, noting that *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869, 1875 (2006) did not undermine the decision and that *Peralta v. Hispanic Business, Inc.*, 419 F.3d 1064, 1076 (9th Cir. 2005) supports it.[17]

To dismiss Petitioner's complaint, the District Court followed *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), underscoring that the substance of the remedy Petitioner seeks is monetary compensation (the loss in profits caused by the decline of the Schwab stock) and rejecting Petitioner's claim that monetary relief typically was available in claims against fiduciaries in courts of equity. The District Court noted that suing a fiduciary does not transform monetary damages into appropriate equitable relief.[18]

Ignoring the plain language of Section 502(a)(3) and misconstruing Supreme Court and Ninth Circuit precedent, Petitioner argues that monetary relief against "breaching fiduciaries was typically and exclusively available in equity" and therefore all actions by participants or beneficiaries against fiduciaries are "equitable" and within the meaning

[17] Pet. App. 1-2.

[18] Pet. App. 10.

of ERISA Section 502(a)(3), regardless of whether the relief would be legal in nature if sought against a non-fiduciary. Petitioner's unsupported arguments have no basis in existing law and should by rejected by the Court.

A. *Great-West* And *Mertens*

In *Great-West* and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court made clear that only equitable relief may be obtained for breach of fiduciary duty under ERISA Section 502(a)(3), which authorizes a civil action

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C. § 1132(a)(3) (2004).[19] The phrase "equitable relief" refers "to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256. On the other hand, money damages, such as those Petitioner seeks, are "the classic form of *legal* relief." *Id.* at 255.

> "Almost invariably . . . suits seeking (whether by [way of] judgment, injunction, or declaration) to

[19] Notably, the language of the statute does not draw any distinction between equitable relief available against fiduciaries versus non-fiduciaries. The Supreme Court has ruled that ERISA Section 502(a)(3) actions are available against fiduciaries and non-fiduciaries. *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 249-53 (2000).

> compel the defendant to pay a sum of money . . . are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty."

Great-West, 534 U.S. at 210 (quoting *Bowen v. Mass.*, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting)).

Through its emphasis on "categories of relief," the Court has made clear that in determining whether requested relief falls within the meaning of "appropriate equitable relief" under ERISA Section 502(a)(3), the key issue is the basis for the plaintiff's claim and the nature of the underlying remedy sought. *See id.* at 213; *see Mertens*, 508 U.S. at 255-59.

In *Mertens*, the Court specifically rejected an interpretation of the statute that would extend the relief obtainable under ERISA Section 502(a)(3) to whatever relief a court of equity is empowered to provide. *See* 508 U.S. at 257-58. The Court concluded that such a reading would "render the modifier ['equitable'] superfluous." *Id.* at 258.

The lower courts followed the distinction explained by *Mertens*. *See Carpenters Health & Welfare Trust for S. Cal. v. Vonderharr*, 384 F.3d 667, 671 (9th Cir. 2004) (the "critical factor" is the substance of the remedy (citing *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1527-28 n.5 (9th Cir. 1993)); *see also Rego v. Westvaco Corp.*, 319 F.3d 140, 145 (4th Cir. 2003) ("Under *Mertens*, then, the relevant question is not whether a given type of case would have been brought in a court of equity, but whether a given type of relief was available in equity courts as a general rule."). In short,

the Court's reasoning in *Great-West* and *Mertens* directly precludes Petitioner's argument that whether the type of action was historically brought in courts of equity determines whether the relief is "equitable."

B. Petitioner Improperly Seeks Monetary Losses Caused By The Decline In The Value Of Schwab Stock And The Alleged Delay In Receiving His Benefits

Petitioner's claim seeking the difference between the value of his account when it was paid and what he contends it would have been worth in the absence of Respondents' alleged negligence is one for money damages, a quintessentially legal remedy. Petitioner implicitly accepts that the remedy he seeks is monetary damages and that if Respondents were non-fiduciaries, the relief he seeks could *not* be characterized as "equitable relief" or brought under ERISA Section 502(a)(3). He argues a suit by a beneficiary against a fiduciary for money damages is always a claim for equitable relief because courts of equity decided virtually all breach of trust actions. This contention contradicts the plain language of ERISA and the prior decisions of this Court, which hold that it is the substance of the remedy sought, not the type of claim or defendant, that determines whether the requested relief is appropriate under ERISA Section 502(a)(3). *See, e.g., Great-West*, 534 U.S. at 213.

In addition to the Supreme Court's decisions, all circuit courts to have directly considered Petitioner's argument after this Court decided *Great-West* have rejected his position that claims for monetary damages by a participant or beneficiary against a fiduciary constitute claims for appropriate equitable relief within the meaning of Section 502(a)(3). *See infra* Part II.

C. Trust Principles Do Not Support Petitioner's Position

Lacking any argument based on the plain meaning of Section 502(a)(3) and valid case law to support his position, Petitioner argues that the monetary remedy he seeks is "equitable relief" because courts of equity historically resolved suits against fiduciaries for breach of trust. This is irrelevant. The Supreme Court has noted that in *Mertens* it specifically considered and "rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)." *Great-West*, 534 U.S. at 219; *see Mertens*, 508 U.S. at 256-57. Therefore, Petitioner's blanket reliance on statements made in trust law treatises regarding the type of causes of action historically decided by equity courts is misplaced.[20]

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[20] *See Callery v. U.S. Life Ins. Co.*, 392 F.3d 401, 409 (10th Cir. 2004) ("While the arguments of amici that we should look to the common law of trusts and award monetary damages pursuant to an equitable breach of trust by a fiduciary may have been compelling before *Great-West*, they are not so now."); *Crosby v. Bowater Inc. Ret. Plan*, 382 F.3d 587, 596 (6th Cir. 2004) ("If it be argued that Mr. Crosby's position should be likened to that of a beneficiary of a trust, who could invoke the jurisdiction of an equity court to enforce a right to receive money from the trust, the short answer is that just such an argument has been explicitly rejected by the United States Supreme Court.") (citing *Great-West*, 534 U.S. at 219); *Rego*, 319 F.3d at 145 ("[T]he scope of [available] relief is emphatically not defined by reference to the 'many situations' at common law 'in which an equity court could establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.'" (quoting *Mertens*, 508 U.S. at 256)); *Tittle v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 284 F. Supp. 2d 511, 607-12 (S.D. Tex. 2003) (explaining and rejecting detailed (Cont'd)

II. The Court Of Appeals' Determination That Section 502(a)(3) Does Not Provide For Monetary Relief Does Not Create A Conflict In The Circuit Courts

The six Courts of Appeal (the First, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits) to consider Petitioner's argument after the Supreme Court decided *Great-West* have flatly rejected it. *See Todisco v. Verizon Commc'ns, Inc.*, No. 06-1957, 2007 WL 2231733 (1st Cir. Aug. 6, 2007) (rejecting plaintiff's claim for compensatory monetary damages to which plaintiff claimed she was entitled due to defendant's failure to honor its oral representations); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 450 F.3d 570, 574-77 (4th Cir. 2006), *cert. granted* 127 S. Ct. 1393 (Feb. 26, 2007) (affirming denial of monetary damages for amount by which plaintiff's retirement account would have appreciated had defendant implemented plaintiff's investment strategy as instructed); *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005) (rejecting attempted distinction between fiduciaries and non-fiduciaries, the court noted that

> *Great-West*'s broadly phrased reasoning forecloses such an argument, . . . for the Court looked only to "the nature of the relief sought" and whether it was a category of relief that was typically available in equity); *Callery v. U.S. Life Ins. Co.*, 392 F.3d

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(Cont'd)
argument based on trust law treatises discussing actions against trustees in equity); *see also Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 482 (6th Cir. 2001) (money damages are not available in an action based on Section 1132(a)(3) (citing *Mertens*, 508 U.S. at 255)). Moreover, the Ninth Circuit applied *Great-West* to an ERISA fiduciary breach action in *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004) and gave no credence to Petitioner's argument.

> 401, 408-09 (10th Cir. 2004) (affirming judgment on the pleadings in favor of defendant on claim brought against fiduciary for face value of insurance policy); *Crosby v. Bowater Inc. Ret. Plan*, 382 F.3d 587, 596 (6th Cir. 2004) (rejecting claim by plan participant against plan administrator under ERISA Section 502(a)(3) for additional lump sum benefits allegedly owed and noting that it "is a distinction without a difference"

that the case does not involve liability that is contractual in nature); *Rego*, 319 F.3d at 145 (noting the Supreme Court has "squarely rejected" the argument that any remedy when sought for breach of fiduciary duty is always an equitable remedy); *see also Tittle v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 284 F. Supp. 2d 511, 610-12 (S.D. Tex. 2003) (same).[21]

Petitioner cites no post *Great-West* cases that have considered his argument and accepted it.

The clear lack of a conflict in the circuit courts regarding Petitioner's Section 502(a)(3) argument warrants denial of his petition for certiorari. This case, unlike the *LaRue* case currently pending before this Court, does not involve a claim under ERISA Section 502(a)(2). The *LaRue* decision created a conflict in the circuit courts regarding the application of 502(a)(2). *See, e.g., In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005). If the Court does not

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[21] *See also Armstrong v. Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994) (pre-*Great-West*, but post-*Mertens*, case rejecting "rather weak" argument focused on distinction between suits against fiduciaries and those against non-fiduciaries).

reach the distinct Section 502(a)(3) question presented in *LaRue*, it should not grant certiorari to address that question here because there is no circuit conflict warranting review.

III. Petitioner's Interpretation Of Section 502(a)(3) Does Not Create An Issue Of Exceptional Importance

Petitioner incorrectly argues that the interpretation of "other equitable relief" Section 502(a)(3) is a significant and recurring remedial issue that has generated pervasive confusion and conflicting results in the lower courts. Pet. Br. 13, 21-22. In fact, *Great-West* and *Mertens* set forth a clear rule based on a plain reading of Section 502(a)(3). Petitioner may wish to change Section 502(a)(3) to allow claims for legal relief against fiduciaries who breach their fiduciary duties under ERISA; however, it is a matter for Congress and not the courts to change the law.

Petitioner incorrectly argues that should the Court not overturn the Ninth Circuit's decision, he and others like him would not have a remedy. In fact, Petitioner had several options available to him to remedy the issues relating to the delay in receiving his benefits. First, as a beneficiary, Petitioner had the option of filing a claim under Section 502(a)(1)(B) to recover benefits due under the Plan, to enforce his rights under the Plan, or to classify his rights to future benefits under the Plan. Thus, upon learning (in January or February 2000) Respondents were not going to immediately pay him, Petitioner could have made a claim for benefits instead of waiting sixteen months to receive his benefits and waiting over four years to request a distribution of the account assets. He elected not to do so. Alternatively, Petitioner immediately could have sued under Section 502(a)(3) to enforce the terms of the Plan. Instead, Petitioner

did nothing while the value of Schwab's stock (and Mr. Ward's account) plummeted.

ERISA's enforcement provision provided adequate remedies to Petitioner had he elected to pursue them in a timely manner. Petitioner's effort to expand the relief available under Section 502(a)(3) to include monetary relief is nothing more than an inappropriate attempt to change the plain meaning of Section 502(a)(3) and to shift the risk of investment loss on Respondents.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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